FILED
JAN 18 1971
BEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NOS. 749, 891

THE BOARD OF PUBLIC INSTRUCTION OF BROWARD COUNTY, FLORIDA, *et al.*,

Petitioners,

v.

FREDERICK ALLEN, *et al.*

BLANCHE ELY PARENT TEACHERS ASSOCIATION, *et al.*,

Petitioners,

v.

THE BOARD OF PUBLIC INSTRUCTION OF BROWARD COUNTY, FLORIDA, *et al.*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN J. CHACHKIN
DREW S. DAYS, III
10 Columbus Circle
New York, New York 10019

W. GEORGE ALLEN
303 S.E. 17th Street
Fort Lauderdale, Florida 33316

Attorneys for Respondents Allen, et al.

TABLE OF CONTENTS

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Constitutional Provisions and Statutes Involved 2

Statement 3

ARGUMENT 9

CONCLUSION 14

TABLE OF AUTHORITIES

Cases:

Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969) 11

Bolling v. Sharpe, 347 U.S. 497 (1954) 10

Brown v. Board of Education, 347 U.S. 483 (1954).....2, 10

Carter v. West Feliciana Parish School Board, 326 U.S. 290 (1970) 11

Davis v. Board of School Commissioners of Mobile County, No. 436, O.T. 1970 12

Green v. County School Board, 391 U.S. 430 (1968)....2, 10

PAGE

Haney v. County Board of Education of Sevier County, 429 F.2d 364 (4th Cir., 1970) 13

McGowan v. Maryland, 366 U.S. 420 (1961) 10
McLaughlin v. Florida, 379 U.S. 184 (1964) 10

Swann v. Charlotte-Mecklenburg Board of Education, Nos. 281 and 349, O.T. 1970 12

Statutes:

28 U.S.C. 1254(1) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NOS. 749, 891

THE BOARD OF PUBLIC INSTRUCTION OF BROWARD COUNTY, FLORIDA, *et al.*,

Petitioners,

v.

FREDERICK ALLEN, *et al.*

BLANCHE ELY PARENT TEACHERS ASSOCIATION, *et al.*,

Petitioners,

v.

THE BOARD OF PUBLIC INSTRUCTION OF BROWARD COUNTY, FLORIDA, *et al.*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

Opinions Below

The opinion of the Court of Appeals (Pet. App. A 32a-46a) is now reported at 432 F.2d 369 (5th Cir. 1970). The decision of the district court is unreported.

Jurisdiction

The decision of the Court of Appeals was entered on August 18, 1970. The petition for certiorari in No. 749 was filed on September 23, 1970. The petition for certiorari in No. 891 was filed on October 23, 1970. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

Questions Presented

No. 749

Whether the court of appeals was correct in ruling that a desegregation plan which left thirteen elementary schools all-black or virtually all-black, enrolling 68% of all-black elementary students in the system, failed to meet the desegregation requirements of *Brown* v. *Board of Education*, 347 U.S. 483 (1954) and *Green* v. *County School Board*, 391 U.S. 430 (1968) where the court found that it was feasible to desegregate totally all the virtually all-black schools by pairing and clustering those schools with nearby predominantly white schools.

No. 891

Whether the courts below were correct in approving the closing of a formerly all-black high school by the school board where there was ample evidence of the physical inferiority of the facility and no alternatives were presented to the trial court by which the school could be desegregated.

Constitutional Provisions and Statutes Involved

Pertinent excerpts from the Fourteenth Amendment to the Constitution of the United States and the Civil Rights Act of 1964 are set forth at page 5 of the petition in No. 749 and at pages 3-4 of the petition in No. 891.

Statement

No. 749

This school desegregation case was commenced on January 9, 1970 seeking injunctive relief against the continued operation of a dual, racially segregated school system in Broward County, Florida, a system which includes the city of Fort Lauderdale. At the time suit was brought there were seventeen all-black schools operating in Broward County (13 elementaries, 2 middle schools, and 2 high schools). Approximately 90.4% of the black elementary school pupils attended schools which were at least 90% black; 56.9% of the middle school black students attended schools over 99% black; and 65.5 percent of the senior high school black students attended all-black schools.

After hearings in the matter, the district court found that the board (petitioners here) was operating a dual school system in violation of the Constitution and ordered it to prepare a desegregation plan that would establish a unitary school system in Broward County. The first plan submitted by the board contained provisions for desegregating only the two all-black high schools. After a hearing was held on that plan, the board was ordered to consult with the Florida School Desegregation Consulting Center (H.E.W.), specifically with respect to desegregating the remaining all-black schools, and H.E.W. was requested to file with the court its own proposals for desegregation. The geographic zoning plan subsequently submitted by the board left ten elementary schools all-black or virtually all-black, enrolling 71% of the black elementary school population of Broward County. In contrast, the plan which H.E.W. submitted left no school all-black and reduced the percentage of black elementary students in predominantly black schools to 14%. This result was

accomplished by pairing the all-black or virtually all-black elementary schools with nearly predominantly white schools. In recommending the pairing technique, the H.E.W. report stated:

> The absence of any large concentration of black population areas in Broward County makes the effective desegregation of elementary schools a distinct possibility. In the opinion of the survey team either the rezoning or pairing of elementary attendance areas can desegregate all of the remaining all-black elementary schools with a minimum of additional busing, most of which would involve distances of less than 4 miles.
>
> Rezoning may be preferred by the Broward system to pairing, but rezoning as a technique is not always feasible. In the opinion of the survey team no educational disadvantage accrues to elementary pupils in paired schools nor are paired elementary schools any more difficult to administrate.

In its final order, the district court rejected the H.E.W. recommendation on pairing and ordered implemented a modified version of the geographic zoning proposed by the board. The result of the court-ordered plan was to leave four elementary schools 100% black, and nine others with black enrollments between 90% and 99%. Sixty-three percent of the total black elementary enrollment would attend these 13 schools. In its order, the district court stated as follows with respect to other techniques for desegregating the remaining black elementaries:

> The only alternatives to leaving these schools segregated are (1) transport or "walk-in" students from noncontiguous or distant areas; or (2) "pairing" an all-white school with an all-Black school, that is, by combining the attendance areas of the "paired" schools and

> sending all students in certain grades to one of the schools and all students in the other grades to the other school. In some insances "grouping" of three or more schools is resorted to, rather than "pairing".
>
> It is difficult to justify the removal of young students to distant areas for the sole purpose of integrating a school. "Pairing" or "grouping" of schools also involves the same elements of additional transportation or "walking in." The same principles apply to attempts to integrate more blacks into predominantly White schools. The time, inconvenience, and expense involved, as well as the safety factor, are all relevant to the resolution of the problem. (Petition App. 16a).

On appeal of the lower court's decision, the 5th Circuit reversed that part dealing with desegregation of elementary schools. On this matter the court below held:

> Our examination of the record before us indicates that the pairing/clustering technique can be utilized to desegregate *every one* (Emphasis in the original) of the 13 all-black or virtually all-black elementary schools envisioned in the plan approved by the district court. This desegregation can be accomplished "without creating impractical attendance zones or inordinate transportation problems." (Petition App. 40a).

The court of appeals' order directed the district court to implement specific pairing and clusterings of schools in two of the three attendance areas in Broward County. In the third area, the court suggested six alternative pairings and groupings from which the district court could select the one alternative it regarded as most feasible. (Petition App. 40a-43a). The district court was directed to deter-

mine the arrangement of grade structures in all the combined schools[1] and was permitted to order alterations and adjustments in its discretion to the extent that such changes would not diminish the degree of desegregation projected by the court of appeals' decision. Concluding its order, the court of appeals indicated:

> It is axiomatic, of course, that the school board and the district court are under a continuing duty to appraise the school system in light of the actual conditions and experience and, within limits we have just indicated, to make whatever changes are necessary, now and in the future, to assure the continued maintenance of a unitary system. (Petition App. 44a).

Upon remand, after hearing arguments from both parties and receiving recommendations from the board, the district court on August 28, 1970, ordered implemented the pairing and clusterings in the two school attendance areas specifically required by the court of appeals, selected the plan it regarded as most feasible for the third attendance area out of the six recommended by the appellate court, and designated how grades would be assigned among the paired and grouped schools. Subsequently, on September 4, 1970, the district court postponed until November 15, 1970 full implementation of the court of appeals order requiring pairing and clustering. Until that date, the board was permitted to operate according to the desegregation plan originally ordered by the district court which had been reversed on appeal. Several petitions of the board to the Fifth Circuit for rehearing, rehearing *en banc*, a stay order

---

[1] The court of appeals recommended that grades in the combined school not be "split", i.e., assigning a particular grade to more than one school in the group, but allowed "splitting" where the degree of desegregation in any attendance zone was not diminished. (Petition App. 43a).

and recall of the mandate were denied by the court of appeals. However, on November 2, 1970, that court stayed the order of the district court of September 4, 1970 "until further orders of this court" and took the board's most recent supplemental petition under advisement. As a consequence, the Broward County school system continues to operate in accordance with the original geographic zoning plan approved by the district court rather than with that involving pairings and clusterings required by the Fifth Circuit.

No. 891

The first hearing in the district court on the complaint seeking desegregation of the dual school system in Broward County was held in January 16, 1970. One month later, on February 16, 1970, the board (petitioners in No. 479, respondents in No. 891) submitted a proposed plan of desegregation to the district court which contained, among other provisions, a statement of the intention to close ("phase-out") the Blanche Ely High School, located in Pompano Beach, Florida. A hearing on the board's plan was held on March 3, 1970 at which time an attorney indicated to the court that he represented the Blanche Ely Parent Teachers Association (petitioners here), a group that opposed the closing of Ely High School, and intended to seek intervention in the desegregation litigation to protect that group's interests. No appearance of counsel nor petition for leave to intervene was filed on behalf of Blanche Ely Parents between March 3 and April 3, 1970. Final hearing in this matter was held in the lower court on April 3, 1970. At that hearing, a second attorney appeared, stated that he represented the Blanche Ely Parent Teachers Association and requested leave of the court to intervene. Leave was granted on April 7, 1970. On April 13, 1970 the second attorney filed his notice of appearance and a petition for leave to inter-

vene. In support of its opposition to the closing of Blanche Ely High School, the Parent Teachers Association appended to its petition documents indicating that Ely was a duly accredited facility, resolutions from community groups in Pompano Beach and telegrams from citizens opposing the closing of Ely. In its final order of April 30, 1970, the district court approved the board's plan to close Ely finding "that it [Ely] was not a reasonably good high school facility, being deficient in every area, excepting physical education." [Petition App. 14a, No. 749]. In addition to having the board's recommendations on Ely, the district court also had before it findings of an expert in educational facilities and specifications hired by H.E.W. which concluded that Ely was an inferior high school plant. In accordance with the board's request, the district court ordered the Ely facility used in 1970-71 to house students from an all-black elementary school that was being closed. On May 11, 1970, the Ely Parent Teachers Association moved for "a new trial and a full trial." The district court denied that motion on June 4, 1970, reiterating its grounds for allowing Ely to be closed (reports of independent experts as to its inadequacy) and its reasons for rejecting the arguments of the Ely Parent Teachers Association (inconclusiveness of accreditation ratings and lack of probative value of the resolutions and telegrams).

The Ely Parent Teachers Association filed a cross-appeal, after plaintiffs appealed seeking review of the lower court's order respecting desegregation of the 13 all-black elementary schools in Broward County. As cross-appellant, it sought reversal of the decision to close Ely High School and argued, along with plaintiffs, that the over-all plan approved by the district court was constitutionally inadequate. In support of its position, the Parent Teachers Association submitted two documents, a certificate of accreditation given

Ely by the Southern Association of Colleges and Schools and an evaluation done of Ely by the same Association in April, 1967. The court of appeals affirmed the closing of Ely stating:

> We are not persuaded that we should order the district court to require the reopening of Blanche Ely as a high school. There is nothing in the record to indicate that the Board's decision to close Blanche Ely was based on anything other than sound educational criteria. Moreover, the record amply supports the district court's finding that the Blanche Ely facility is not an adequate physical facility for conducting a high school program. In the light of these factors, we find no merit in the intervenors' objection to the closing of the school. (Petitioners App. 36a-37a, No. 749).

ARGUMENT

I.

The two issues raised by the board's petition are controlled by previous decisions of ths Court. There are no other issues presented to warrant granting a writ of certiorari. The board's first argument contends that the order of the court of appeals which requires the pairing and grouping of some, but not all, schools in Broward County to desegregate the dual system works a denial of equal protection upon those students attending the paired and grouped schools. The concept of equal protection, embodied in both the 5th and Fourteenth Amendments, forbids state or federal government to establish arbitrary, irrational distinctions among classes of persons. If distinctions are made by a governmental entity which works a hardship upon one or more classes as compared to others, such distinctions

must be justified in terms of being reasonably related to a legitimate governmental purpose. *McGowan* v. *Maryland,* 366 U.S. 420 (1961); *McLaughlin* v. *Florida,* 379 U.S. 184 (1964); *Bolling* v. *Sharpe,* 347 U.S. 497 (1954).

With respect to the problem of segregated public education, this Court, since *Brown* v. *Board of Education,* 347 U.S. 483 (1954), has put states and all courts, state and federal, on notice that dual school systems of black and white schools must be dismantled "root and branch" and unitary, non-racial systems established in order to comply with the Constitution. In *Green* v. *County School Board,* 391 U.S. 430 (1968) this Court required school boards to present, and federal courts to demand, desegregation plans which offered meaningful prospects of achieving immediate and complete disestablishment of dual school systems. What the board challenges in this case is the fact that the court below fulfilled its responsibility under *Brown, supra* to desegregate totally the school system in Broward County. The simple answer is that whatever distinctions were made by the court between classes of school children were justified because they were intimately related to a legitimate constitutional purpose, — desegregation of the school system. Some schools were involved in the desegregation process more than others because of their proximity to schools of heavy black concentration. Nothing in the Fourteenth Amendment warrants denominating this desegregation process as a denial of equal protection. And in any event, if petitioners' analysis were adopted, it could be argued that school boards have traditionally discriminated against various classes of school children by assigning some, but not all, to K-6 schools, some to K-3 schools, some to new schools, some to old schools, some to schools with specialized teaching staffs and equipment, *ad infinitum.* It is difficult to see the constitutional distinction between

assigning children to schools of differing grade levels to achieve desegregation and such assignments as a consequence of normal school administrative procedures.

The board further contends that the court of appeals order denied due process under the Constitution. This argument has no more merit than the first. As the record in this case reflects, the district court received extensive information from not only the board, but also from H.E.W. experts and private plaintiffs with respect to desegregating the Broward County school system. In its final order, the district court rejected the H.E.W. recommendations for pairing and grouping the all-black elementary schools with nearly predominantly white schools because it did not favor the use of such techniques, not because they were infeasible or unworkable. In so doing, the court acted in conflict with this Court's holdings in *Green, supra.* The court of appeals, armed with extensive information on pairing and clustering and the fact of the lower court's error of law, was able to devise an effective desegregation plan relating solely to elementary schools. The other areas of concern which the district court evaluated and ruled on in accordance with *Green, supra,* were left untouched by the appellate court. And, as indicated above, crucial decisions on the arrangement of grade structures in the paired and grouped schools, which set of pairings and groupings would be appropriate for the last of three attendance areas (out of a list of six alternatives) and the extent to which the court of appeals plan should be modified or altered in the future were all left to the discretion of the district court on remand, based upon its experience, familiarity with local conditions, and ability to consult with board officials. According to this Court's strict instructions in *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19 (1969) and *Carter* v. *West Feliciana Parish School Board,* 396 U.S. 290 (1970) dual

school systems were to be ended immediately, not later than February, 1970 in the *Carter* cases. The court of appeals in this case made an exemplary attempt to meet its constitutional responsibility, while at the same time permitting board officials and the district court to make whatever alterations were necessary in the desegregation plan without reducing the degree of disestablishment of the dual system its order achieved. Its action was in complete accord with the requirements of procedural due process. Insofar as petitioners in No. 749 seek review of the questions of racial balance and busing which they contend are raised by this record, this Court presently has before it two cases, *Swann* v. *Charlotte-Mecklenburg Board of Education,* Nos. 281 and 349, this Term, and *Davis* v. *Board of School Commissioners of Mobile County,* No. 436, this term, in which those issues have already been extensively briefed and argued. To the extent that decisions in those cases may affect the issues decided in this case, appropriate motions for supplemental relief or modification may be presented to the courts below.

II.

Petitioners in No. 891 present equal protection and due process arguments as well to support the contention that the lower courts erred in allowing Ely High School to be closed. On the matter of denial of equal protection, the Ely Parent Teachers Association has not presented evidence in any court that refutes the determination made by the board and an outside educational expert that Ely High School was an inadequate, inferior secondary school facility. Documents indicating Ely's accreditation and a three-year-old evaluation of its facilities established nothing with respect to the physical conditions at the high school. The record, therefore, reflects a sufficient educational, non-racial basis for the district court's decision to close Ely. Furthermore,

by closing Ely, the district court thereby increased the degree of desegregation in surrounding, physically superior high school facilities, which it was required to do under *Brown, supra* and *Green, supra.* With respect to the contention that the district court denied the Ely Parent Teachers Association due process of law, the record is also dispositive. First, the Association procrastinated an entire month, from March 3 to April 3, 1970, before actually filing a petition to intervene. April 3 was, of course, the date scheduled for final hearing in this matter. Second, the Association's evidence in support of its opposition to the closing of Ely was then and has always been documentary. That the district court refused to allow the Association to put on testimony in support of inconclusive documentary evidence cannot be regarded as a denial of due process. Finally, it is evident, especially in the petition itself (page 13) that what the Association seeks is the continuation of Ely High School at any cost, irrespective of whether the facility is desegregated, predominantly black or even all-black. The decisions of this Court precluded the district court and court of appeals from agreeing to the demands of the Association to keep Ely open even as an all-black facility.

Certainly the issue of black school closings as a consequence of the desegregation process presents constitutional questions, which on a record quite different from the one in this case, may have to be considered by this Court. See *Haney* v. *County Board of Education of Sevier County,* 429 F.2d 364 (8th Cir., 1970). Here, nothing in the record indicates that the court below or the district court acted arbitrarily or discriminatorily in ordering the closing of Ely High School.

CONCLUSION

For the foregoing reasons, the petitions in Nos. 749 and 891 for writs of certiorari should be denied.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN J. CHACHKIN
DREW S. DAYS, III
10 Columbus Circle
New York, New York 10019

W. GEORGE ALLEN
303 S.E. 17th Street
Fort Lauderdale, Florida 33316

Attorneys for Respondents Allen, et al.